IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-545

UNITED AIR LINES, INC.,
Petitioner,

vs.

LIANE BUIX McDONALD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Petitioner, United Air Lines, Inc. (herein "United") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on July 1, 1976.

OPINIONS BELOW.[1]

The Opinions and Orders of the District Court for the Northern District of Illinois of December 6, 1972 striking the class

1. Carole Anderson Romasanta was plaintiff in the trial court. The suit was settled and dismissed as to her and she was not a party to the appeal below, although her name appeared in the Court of Appeals caption as plaintiff. Liane Buix McDonald, respondent here, was petitioning intervenor in the trial court and appellant in the Court of Appeals. No. 75-2063. See App. A, A14.

action allegations, of October 3, 1975 dismissing the action after settlement with the named plaintiffs and intervenors, and of October 21, 1975 denying intervention to respondent are unreported and appear in Appendix A, A1-A13. The opinion of the Court of Appeals reversing the rulings of the trial court is reported at 537 F. 2d 915 (7th Cir. 1976) (Appendix A, A14-A25).

JURISDICTION.

The *per curiam* opinion by a divided panel of the Court of Appeals was entered on July 1, 1976. Petition for rehearing and suggestion of in banc rehearing was denied on September 1, 1976. The eight active judges of the Court of Appeals divided four-four on the suggestion of an in banc rehearing (Appendix A, A26). Jurisdiction is conferred on this Court by 28 U. S. C. Section 1254(1).

QUESTION PRESENTED.

1. Does the principle established in *American Pipe & Construction Co.* v. *Utah*, 414 U. S. 538 (1974) that the applicable statute of limitations is suspended for putative class members only until class action status is denied apply to all class actions, including those brought under Title VII of the Civil Rights Act of 1964?

STATUTES INVOLVED.

The relevant portion of Section 706(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000e-5(e) is set forth below:

* * * * *

> Sec. 706. (e) A charge under this section shall be filed within 180 days after the alleged unlawful employment practice occurred. . . .

The relevant portions of Rules 23 and 24 of the Federal Rules of Civil Procedure are set forth in Appendix B.

STATEMENT OF THE CASE.

Introduction.

The opinion of the majority of the Court of Appeals holds that it was error for the trial court to deny intervention by a putative class member three years after denial of class action status, two and one-half years after the applicable limitations period had run, and three weeks after final order of dismissal.

If the decision of this Court in *American Pipe & Construction* v. *Utah*, 414 U. S. 538 (1974), is of general application in class action litigation—as it appears to be—then the decision below should be summarily reversed.

In *American Pipe* this Court held that the filing of a class action tolls the running of the statute of limitations for putative class members, but only until class action status is denied. The trial court had held that the tolling was conditional upon a certification of class and that denial of class status "untolled" the limitations period as though the class suit had not been filed. Intervention had been denied by the trial court on the view that the statute of limitations had run out eleven days after the suit was filed, and since class status was eventually denied, intervention thereafter was untimely. Since intervention had been sought eight days after denial of class status, this Court held intervention to be timely. But, emphasized the Court (414 U. S. at 561):

> . . . the commencement of the class action . . . suspended the running of the limitation period *only* during the pendency of the motion to strip the suit of its class character. [Emphasis supplied.]

Justice Blackmun was concerned that extending the tolling for putative class members to the time of denial of class action had the potential for inviting stale claims. In concurring, he

observed that the trial judge could still exercise discretion in allowing intervention under the provisions of Federal Rule 24(b) even where the limitations period had not expired under the Court's decision. 414 U. S. at 561-62.

Background.

Until November 1968 it was the policy of petitioner United Air Lines that flight attendants had to be and remain unmarried as a condition of employment. This policy was abrogated at that time by agreement with the Air Line Pilots Association ("ALPA"), the bargaining agent for United's flight attendants.

Shortly thereafter one of the terminated flight attendants, Mary Sprogis, filed suit against United claiming the policy was a violation of Title VII of the Civil Rights Act of 1964.

In *Sprogis* v. *United Air Lines*, 444 F. 2d 1194 (7th Cir. 1971), *cert. den.* 404 U. S. 991 (1971), the Seventh Circuit affirmed the trial court's holding that the no-marriage policy did violate Title VII as discrimination in employment based on sex. The Court of Appeals remanded to the trial court the reserved question of whether the action—commenced as an individual suit—could be converted to class action after judgment. In June 1972, the trial court ruled that class action was not appropriate, primarily because of the prohibitions in Federal Rule 23 against "one-way intervention." 56 F. R. D. 420, 422-23 (N. D. Ill., 1972). No appeal was taken by plaintiff Sprogis or any putative class member, including the respondent here, from this decision.[2]

In May 1970, while *Sprogis* was pending on appeal, this action—*Romasanta* v. *United Air Lines*—was commenced as a class action by another former flight attendant apparently as a hedge against an adverse class determination in *Sprogis*. Both *Sprogis* and *Romasanta* were financed by ALPA, and plaintiffs in both suits were represented by the same counsel. Both cases were assigned to the same trial judge.

2. Plaintiff appealed only the denial by the trial court of attorney fees. *Sprogis* v. *United Air Lines*, 517 F. 2d 387 (7th Cir. 1975).

In December 1972, the trial court granted United's motion to strike the class allegations in *Romasanta* on grounds of lack of numerosity. Intervention on behalf of several former flight attendants was then timely sought. Respondent McDonald was not among them. Intervention was granted as to thirteen. Others were denied intervention. A4-A7. The named plaintiff unsuccessfully petitioned for appeal under 28 U. S. C. § 1292(b) from the denial of class action status. However, no effort was made to appeal from the order denying intervention, although that order was clearly final and appealable,[3] and although those denied intervention were also represented by the same counsel representing plaintiff Romasanta.

Discovery and various settlement discussions concerning plaintiff Romasanta and intervenors then ensued and on October 3, 1975—three years after class action status was denied—a final order dismissing the suit with prejudice was entered, all original and intervening claims having been "settled and resolved." A12.

Three weeks later, on October 21, 1975, petitioning intervenor McDonald—the respondent here—first came on the scene. Ms. McDonald is a former United flight attendant who had been terminated in September 1968 under the then existing no-marriage policy. She filed no grievance under the collective bargaining agreement, no charge with the Equal Employment Opportunity Commission ("EEOC"), participated in no litigation, and in no manner made known her belated claim that she was protesting the 1968 action of United. Her affidavit filed below acknowledges that she was fully aware of the *Sprogis* and *Romasanta* litigation from the inception, but she took no action of any kind until October 21, 1975.

On that day Ms. McDonald filed a motion to intervene for the purpose of appealing from the December 1972 order denying

3. As to the finality and appealability of an order denying intervention, see *EEOC* v. *United Air Lines*, 515 F. 2d 946, 948-49 (7th Cir. 1975).

class action status. The trial judge denied the motion to intervene as untimely:

> THE COURT: Well, in my judgment, gentlemen, this is five years now this has been in litigation, and this lady has not seen fit to come in here and seek relief from this Court in any way during that period of time, and litigation must end. I must deny this motion.

Ms. McDonald then appealed the denial of intervention and the December 1972 order denying class action status.

The Decision of the Court of Appeals.

On July 1, 1976, the Court of Appeals, in a two-one decision, reversed the trial court. The majority distinguished *American Pipe* in a footnote, on the ground that in Title VII actions the statute was tolled upon the filing of a charge with the EEOC—a *non sequitur* since the issue on appeal was not the commencement of the tolling of the 180-day limitation statute under Title VII, 42 U. S. C. § 2000e-5(e), but rather when the statute started running again. (A18, n. 6.)

Judge Pell, in dissenting, stated that under *American Pipe* the statute of limitations began to run again in December 1972 upon denial of class action status, and that Ms. McDonald had to act promptly thereafter "if she wanted to take advantage of this lawsuit as a forum for her claims." (A20.)

The eight active members of the Court of Appeals divided four-four on the suggestion for a rehearing in banc. (A26.)

REASONS FOR GRANTING THE WRIT.

The decision of the Court of Appeals is in direct conflict with a prior decision of this Court.

American Pipe held that the commencement of a class action suspended the running of the applicable statute of limitations "only during the pendency of the motion to strip the suit of its class character." 414 U. S. at 561.

Here intervention was sought three years after denial of class action status and at least two and one-half years after the limitations period would have run had it commenced running after class denial. Yet the majority decision below held the trial court erred in denying intervention as coming too late.[4]

The majority opinion disposed of *American Pipe* in a footnote:

> See also *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 551. The specific holding in *American Pipe* that the statute of limitations is tolled only during the pendency of the motion to certify a class and begins to run anew if the motion is denied *is not applicable here*. The statute of limitations in Title VII actions is suspended once one member of the class initiates the grievance mechanism. See *Bowe* v. *Colgate-Palmolive Co., supra*, 416 F. 2d at 720. [Emphasis supplied.] (A18, n. 6.)

The reference to *Bowe* is irrelevant: the holding of *Bowe* (and other cases) that the filing of an EEOC charge tolls the statute of limitations for all putative class members was never challenged here and is not the issue. The issue is when does the

4. Under Title VII, the complainant must file a charge with the Equal Employment Opportunity Commission within 180 days of the alleged discriminatory act as a prerequisite to filing a lawsuit. 42 U. S. C. § 2000e-5(e). Assuming Romasanta's filing of an EEOC charge followed by her filing this action tolled the statute of limitations with respect to respondent's claim, the statute would nevertheless begin to run again from the December 6, 1972 order denying class status. Thus the maximum statutory period for respondent would have been 180 days from the December 6, 1972 date, or June 4, 1973.

statute begin to run again. *American Pipe* teaches that it commences to run when class status is denied.

In the opening sentence of its opinion in *American Pipe*, this Court stated: "This case involves an aspect of the relationship between a statute of limitations and the provisions of Fed. Civ. Proc. Rule 23 regulating class actions in the federal courts." 414 U. S., at 540. There is no suggestion in the decision that it is applicable only to this relationship in anti-trust class actions, or applicable to all class action litigation except that under Title VII.[5] Nor does the majority decision below advance any sound reason for not applying the *American Pipe* doctrine in civil rights litigation.

Although not specifically addressing the issue as to when the statute of limitations would commence running, the majority implied that the statute continues to be tolled until the "champion of the class . . . abdicates." (A18.) "Abdication," held the court, did not occur until three weeks after the final order of dismissal of October 3, 1975, when the individual plaintiffs who had settled all their claims allegedly advised Ms. McDonald they had decided not to appeal the class action denial.[6] (A17, 18.)

5. Title VII class action suits are not exempt from the requirements of Rule 23. *E.g., Nance* v. *Union Carbide Corp.*, ... F. 2d ....., 13 FEP Cases 231, 234 (4th Cir. 1976). *See also, Oatis* v. *Crown Zellerbach Corp.*, 398 F. 2d 496, 499 (5th Cir. 1968); *Crockett* v. *Green*, 534 F. 2d 715, 717-18 (7th Cir. 1976); *Wright* v. *Stone Container Corp.*, 524 F. 2d 1058 (8th Cir. 1975); *Black* v. *Central Motor Lines*, 500 F. 2d 407 (4th Cir. 1974).

6. This test enunciated by the majority makes the running of the limitations period dependent on the state of mind of the named plaintiffs and the exchange of information between plaintiffs and putative class members, hardly objective factors upon which to base a principle of class action administration. The opinion does not tell us how "abdication of the champion" would be established if the plaintiffs and putative class members were not in communication. Would the putative class members have a duty to seek out plaintiffs to ascertain their intentions? Would there be a hearing to determine if, when and how the putative class members learned of the "abdication"? If the putative class members first learned that the plaintiffs did not intend to appeal because time for filing notice of appeal had expired would a motion to intervene still be timely? By introducing this subjective test the majority opinion creates a host of problems under the Federal Rules, apart from the conflict with *American Pipe.*

This simply begs the question. Action or inaction by the named plaintiff, the "class champion," is not the issue. If the statute of limitations started running after denial of class action in December 1972—as *American Pipe* holds—then Ms. McDonald had to rely on herself from then on. There no longer was a "champion." She had six months in which to seek intervention, and, if unsuccessful, to appeal. She was in no different position than would have been the intervenors in *American Pipe* if they had waited four more days until after the statute of limitations had run out, to file intervention petitions. Indeed, this is exactly what happened to those attempting to intervene only 40 to 44 days after class action status denial in *Monarch Asphalt Sales Co.* v. *Wilshire Oil Company*, 511 F. 2d 1073 (10th Cir. 1975). There the Court of Appeals, relying on *American Pipe*, affirmed the trial court ruling denying intervention because the limitations statute, tolled until the adverse class determination, began running again and expired prior to the time the intervention petitions were filed. *See also Pearson* v. *Ecological Science Corp.*, 522 F. 2d 171, 176-78 (5th Cir. 1975), *cert. den.* 96 Sup. Ct. 1508 (1976).

The majority argues that the petition to intervene after final judgment in October 1975 was "timely" under Rule 24(b) because Ms. McDonald did not learn until that time that the named plaintiffs would not appeal from the final order. (A17.) But Rule 24 cannot operate to enlarge the statute of limitations: as Justice Blackmun pointed out in his concurring opinion in *American Pipe*, the Rule may be used in the discretion of the trial court to deny intervention where the statute has *not* run. Where, as here, the petition to intervene is filed after the statute of limitations has run, it is clearly untimely.

Finally, the majority sought to justify its holding for the reason that "To hold otherwise would permit one member of the class to obtain benefits greater than other members." (A18.)

But this is the effect of timeliness requirements and statutes of limitations in all litigation, including class actions. That is precisely what *American Pipe* is all about. Relief is denied to those who have slept on their rights. Disputes must end sometime, and rights not timely asserted are lost. The majority's observation does not distinguish *American Pipe:* it argues with it.[7]

Judge Pell in his dissent put the issue succinctly (A24-25):

> When a class action is denied, former putative class members may not ignore this fact and continue on the assumption the suit is a class action . . . as does petitioner. The denial of class status is a critical point which puts putative class members on notice that they must act to protect their rights. The tolling procedure established by the Supreme Court in *American Pipe & Construction Co.* v. *Utah,* 414 U. S. 538 (1974), would have no meaning without its corollary requirement that as soon as the class is decertified, former class members who want relief must "make timely motions to intervene." (414 U. S. at 553.)

7. Indeed, ~~this Court's~~ the Seventh Circuit's ruling creates the anomalous situation where parties who unsuccessfully brought their own suits to protest United's former no-marriage rule are now barred by the statute of limitations and *res judicata* from being granted relief while respondent and other putative class members at this time unknown, who have done nothing for a least seven years, may now seek recovery. Several former United stewardesses who had been terminated because of the no-marriage rule filed an action in 1971 in the United States District Court for the Central District of California. The trial court denied relief because the plaintiffs, who had been terminated in 1966 and 1967, had not filed timely charges in accordance with the provisions of Title VII. *Buckingham* v. *United Air Lines, Inc.,* Civil No. 71-731-LTL. In addition, Doris Collins, who resigned in May, 1967, filed a charge with the EEOC in November, 1971 and instituted an action in the Western District of Washington in November, 1972. She was denied relief by the trial court because her charge was not timely filed. This action by the trial court was affirmed by the Ninth Circuit in *Collins* v. *United Air Lines, Inc.,* 514 F. 2d 594, 596 (9th Cir. 1975). Because of the lawsuit pending at that time in the District Court, Collins was denied intervention in this case below. And, in reliance on the *Collins* opinion, summary judgment was granted on August 5, 1975 by the trial court below against Lynn Mason Raymond, a putative class member who had been allowed to intervene in 1972. This dismissal was not appealed.

Class actions under Title VII and other civil rights statutes are proliferating. It is of the utmost importance that this Court clarify the ambiguous state in which the majority decision below leaves the issue. If the decision below is allowed to stand it will frustrate the policy of Title VII to encourage conciliation and voluntary settlement. See 42 U. S. C. § 2000e-5(b).[8] No Title VII class action suit can be settled where class status is denied. A defendant cannot know with whom it can settle until after appellate review of the class action denial.[9] The trial court will be severely handicapped in management of the suit, for the court will never know when putative class members—like the intervenor here—may someday simply appear.

If *American Pipe* applies to all class actions—as it appears to—then the decision of the court below should be reversed. If this Court meant something other than what appears from the plain language of its decision then guidance is imperative

8. The Seventh Circuit Court of Appeals itself recognized this policy in an earlier decision. ". . . As a general proposition the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation. This is especially true within the confines of Title VII where 'there is great emphasis . . . on private setttlement and the elimination of unfair practices without litigation.' " *ALSSA* v. *American Airlines,* 455 F. 2d 101, 109 (7th Cir., 1972), citing *Oatis* v. *Crown Zellerbach Corp.,* 398 F. 2d 496, 498 (5th Cir. 1968).

9. The majority opinion refers to *Anschul* v. *Sitmar Cruises, Inc.,* ..... F. 2d ....., 21 Fed. R. Serv. 2d 946 (7th Cir. 1976) to the effect that named plaintiffs may not appeal denial of class action status at time of denial but must await final order (A15, n. 3). The point is not relevant since the issue here is the status of putative class members who are out of the case after denial, not named plaintiffs for whom the case survives as an individual action. In any event, the right of a named plaintiff to appeal denial of class action after final judgment may be waived as a result of settlement. This was recognized by the Seventh Circuit in *King* v. *Kansas City Southern Industries,* 519 F. 2d 20, 27 (7th Cir. 1975). That is precisely what happened here. The final order was one of dismissal with prejudice, all matters "having been settled and resolved." A12. Here the plaintiff and prior intervenors could not appeal class action denial because of the agreed settlement order. This was the risk respondent took in not acting in her own interest promptly after denial of class action status in December 1972.

to spell out precisely what the status of putative class members is after denial of class action in various types of suits, including Title VII suits.

We respectfully submit that there is nothing unique about a Title VII class action which distinguishes it from class actions based on any other statute; this Court suggested no such difference in *American Pipe;* no reason advanced by the court below supports such a distinction.

CONCLUSION.

For the foregoing reasons, we respectfully request that this petition for a writ of certiorari be granted, and that the decision of the court below be summarily reversed on the authority of *American Pipe & Construction Co.* v. *Utah,* 414 U. S. 538 (1974).

Respectfully submitted,

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October 20, 1976.

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

CAROLE ANDERSON ROMASANTA and BRENDA BAILES ALTMAN,
Plaintiffs,

vs.

UNITED AIR LINES, INC., a corporation,
Defendant.

No. 70 C 1157.

MEMORANDUM AND ORDER

Plaintiffs Carole Anderson Romasanta and Brenda Bailes Altman are former stewardesses employed by defendant United Air Lines, Inc. ("United"). They allege they have been subjected to discrimination because of their sex with respect to conditions and privileges of their employment. Their action challenges the validity, under Title VII of the Civil Rights Act of 1964, of United's policy that stewardesses in its employ be and remain unmarried.

The suit was brought as a class action to secure relief similar to that granted by this court in *Sprogis* v. *United Air Lines, Inc.,* No. 68 C2311. On January 21, 1970 in its decision in *Sprogis,* this court found that United's enforcement of its no-marriage policy for stewardesses resulted in her discharge and discriminated against Mrs. Sprogis because of her sex. It ordered, among other things, the taking of an accounting as to her claim for compensation for lost pay. United appealed. On

June 16, 1971 the Court of Appeals affirmed this court's ruling in *Sprogis* and on December 14, 1971 the Supreme Court denied United's petition for writ of certiorari.

Approximately four months after this court's decision in *Sprogis* the complaint in this case was filed on May 15, 1970. In *Sprogis* the court had left open the question as to whether the relief afforded Mrs. Sprogis should be made applicable to other stewardesses discharged by United pursuant to its no-marriage policy. The *Romasanta* case was held on the court's past case calendar while disposition of Sprogis was pending in the courts above. Upon remand the court considered the issue of whether class relief was appropriate in *Sprogis* and a motion to consolidate *Romasanta* with *Sprogis*.

In its Memorandum and Order of June 14, 1972, the court denied the motion to convert *Sprogis* into a class action and to consolidate it with *Romasanta* for reasons in its Memorandum and Order set forth. Among other things the court therein pointed out that after it appeared Mrs. Sprogis was to have relief the Romasanta action was brought here and other stewardesses sought to benefit *after a decision on the merits*. The court found it would be unjust to defendant to allow one-way intervention for if class relief were extended, it was probable no class member would decline to join in a chance for monetary reward once the discrimination issue had been determined. However, it again pointed out that the relief granted on the discrimination issue in *Sprogis*, if found applicable, could be extended to other stewardesses but that they must present their cases on the merits. The court specifically stated that its views were in no way prejudicial to the eventual disposition of the *Romasanta* case on its merits. (The *Sprogis* case is now continuing as an individual action for the purpose of determining her lost pay.)

Defendant United has moved the court to strike all allegations of the *Romasanta* complaint relating to class action and to direct the matter to proceed as an individual action on behalf of

plaintiffs Carole Anderson Romasanta and Brenda Bailes Altman. At subsequent hearings the court indicated it was of the opinion the action should not proceed as a class action although it would allow additional stewardesses to intervene by way of joinder as addition[al] parties plaintiff if their joinder is proper. Thereafter a motion to intervene was filed by 24 individuals.

The court has considered the motion to strike the class allegations and the motion to intervene, the memoranda of counsel for the parties and those affidavits and exhibits submitted. It has heard argument of counsel at several hearings. It now is of the opinion those individuals allowed to join in this action should be limited to all former stewardesses who resigned or who were terminated because of United's said policy between July 2, 1965 and November 7, 1968 and who thereafter protested the no-marriage policy or termination by filing a valid grievance under the applicable bargaining agreement between United and the Air Line Pilots Association ("ALPA") or a valid complaint with the Equal Employment Opportunity Commission ("EEOC") or any appropriate State agency. It will exclude, however, any present or former stewardess of United who has accepted an offer of reinstatement pursuant to the agreement between United and ALPA, or any stewardess who voluntarily withdrew or abandoned her claim, or who pursued any other administrative or judicial remedy to conclusion.

Involved here are some stewardesses who resigned because of marriage and did protest the no-marriage policy of United by filing grievances under the collective bargaining agreement between defendant and ALPA or by filing charges under Title VII. Defendant contends others did not protest and it is reasonable for the union and defendant United to assume that since they did not protest they had no further interest in further employment. It appears to the court intervenors should be limited to those who protested, did not settle and were truly interested in employment.

On November 7, 1968 United revoked its no-marriage policy by agreement with the Air Line Pilots Association, the authorized collective bargaining representative of the stewardesses in United's employ. Under the agreement United offered reinstatement to all stewardesses terminated as a consequence of the no-marriage policy and who had filed a valid grievance under the collective bargaining agreement or a valid complaint with the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964 or before State agencies. Said Letter of Agreement stated, in part: "Acceptance of reinstatement will be in full satisfaction of any grievance or complaint filed by such stewardesses."

According to the defendant, 30 stewardesses qualified for and were offered reinstatement under the said agreement; eleven accepted; three tendered resignations; two did not respond and United received no further communication from them. Some instituted civil actions. Three of the 30 now have claims pending before the State of New York Division of Human Rights.

Defendant in its response to the motion of the 24 to intervene does not object to the intervention as plaintiffs of eight stewardesses. The court, therefore, will grant the motion to intervene of these eight, namely, Sandra Moore Ballinger, Sarah A. Boling, Carol Elaine Brackle, Catherine Reese Colvin, Susan Fusco, Judith Hopkins Pendleton, Terry Baker Van Horn and Mary O'Connor Whitmore. It appears these eight individuals protested their termination by filing a grievance pursuant to the provisions of the collective bargaining agreement between United and ALPA, of which they were members. Some of them also filed charges with the EEOC. As to Marlene Riehl Carney it appears that a dispute has been resolved as to whether she did nor did not file a grievance under the collective bargaining agreement, and upon a hearing defendant indicated no objection to her joinder. Marlene Riehl Carney is therefore added as an additional party plaintiff.

Defendant objects to the inclusion of seven stewardesses on the grounds that they accepted reinstatement in full satisfaction of any grievance or complaint they had pursuant to the agreement aforesaid between United and ALPA. Plaintiffs' attorney argues the acceptance of reinstatement does not preclude them from pursuing their remedy under Title VII. They accepted reinstatement in full satisfaction of their grievance. The motion to intervene is denied as to these seven, namely, Elizabeth Glenn Ashworth, Bernadette Dixon, Barbara A. Klocek, Gloria Lala, Patricia M. Moon, Janice Schmidt Rensch and Jeanette Byers Schlau.

Three others of the 24 seeking to intervene here, namely, Mary Weis, Helen Read Gunst and Diane M. Welty, have filed charges with the New York Division of Human Rights against United. Upon hearing it appears the issues of liability has already been determined there and that the issue of the amount of such liability is being determined. Although counsel argues that these three should be included in the suit here until such time as the settlement of their claims is actually consummated and "scrutinized" by this court, it is sufficient that they are pursuing their remedies to near conclusion elsewhere. Their exclusion does not preclude their bringing their own action if the settlements are not consummated. The motion of Mary Weis, Helen Read Gunst and Diane M. Welty to intervene in this action is denied.

Upon hearing it was also determined Doris Rivas Collins has filed an action in the District Court of Washington at Seattle. She is pursuing her judicial remedy elsewhere and her motion to intervene in this action is also denied.

To its response to the motion to intervene, United attached copies of letters from Evelyn A. Ambrose in which she accepted an offer of reinstatement pursuant to the United and ALPA agreement. United further represents that she did not wish reinstatement but was withdrawing her grievance. In her case plaintiffs' attorney contends that her acceptance did not have the

effect of precluding her from pursuing a remedy under Title VII and denies that her acceptance without reinstatement constituted a binding waiver or revocation of her rights. Mrs. Ambrose accepted an offer of reinstatement and withdrew her grievance. Her motion to intervene here is denied.

The facts as to the situations of the three remaining who seek to intervene are more in controversy. United objects to the inclusion here of Rita Gardino Trubshaw on the ground she made no response to a letter of November 14, 1968 offering her reinstatement and did not communicate with United and it contends she therefore abandoned her claim. This is disputed. In Mrs. Trubshaw's case it is contended that she notified United of her rejection of the offer, that she did not receive a second unconditional offer of reinstatement and that she did not withdraw her grievance or abandon her claim. In the case of Lynn Mason Raymond defendant objects on the ground she did not file a valid grievance under the collective bargaining agreement nor, to its knowledge, with the EEOC. It appears her employment was terminated in 1966. Attached to plaintiff-intervenor's reply is an exhibit showing Mrs. Raymond did file charges with the EEOC and that the District Director of the EEOC made findings relative to her complaint. Defendant also objects to the inclusion of Joanne Fitzgerald Hamersley on the ground that it has no knowledge she filed a valid grievance under the collective bargaining agreement or with EEOC. It appears from the exhibits Mrs. Hamersley did file charges of discrimination with the EEOC in November and December 1970. She sets forth she resigned voluntarily December 23, 1967 because she was getting married.

The court will allow these three, namely, Rita Gardino Trubshaw, Lynn Mason Raymond and Joanne Fitzgerald Hamersley to join in this action.

In considering the equities, it does not seem fair and reasonable to this court that it should allow a stewardess terminated prior to November 7, 1968 to intervene here unless she indi-

cated in a timely manner her desire to continue working by taking some affirmative action to protest United's policy or seek reinstatement.

Attorneys for plaintiffs say they have made every effort to communicate with all persons who may be eligible to intervene in this action as plaintiffs as authorized by this court on September 11, 1972 but have been unable to locate seven persons of whom they are aware. They request the court to allow them to pursue their efforts to locate these persons by publishing notices in newspapers in various stewardess domiciles and then to allow them to intervene as they may be located. That part of the motion to intervene is denied.

It is ordered that all allegations of the complaint relating to class action be stricken and that this action not proceed as a class action. The class of plaintiffs who protested their termination does not meet the numerosity requirement of Rule 23(a) of the Federal Rules of Civil Procedure. Those individuals whose motions to intervene are being granted will come in by way of joinder as additional parties plaintiff. Based on the controversies already evident between counsel on the fact situations as to various stewardesses, the court is more than ever convinced a class action would not be expeditious or efficient. The court itself has attempted to chart the situations as to each of the 24 individuals seeking to intervene, and based on only what is before it is more than ever convinced that it has a series of individual suits within a suit, that the merits may vary from individual to individual, that all are not similarly situated.

The motion to intervene is granted as to Sandra Moore Ballinger, Sarah A. Boling, Carol Elaine Brackle, Catherine Reese Colvin, Susan Fusco, Judith Hopkins Pendleton, Terry Baker Van Horn, Mary O'Connor Whitmore and Marlene Riehl Carney. It is denied as to Elizabeth Glenn Ashworth, Bernadette Dixon, Barbara A. Klocek, Gloria Lala, Patricia M. Moon, Janice Schmidt Rensch, Jeanette Byers Schlau, Mary Weis, Helen Read Gunst, Diane M. Welty, Evelyn A. Ambrose and

Doris Rivas Collins. The motion to intervene as it relates to Rita Gardino Trubshaw, Lynn Mason Raymond and Joanne Fitzgerald Hamersley also is granted. Defendant United is ordered to answer within twenty days.

The court is of the opinion that its order involves controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from its order may materially advance the ultimate termination of the litigation.

ENTER:

/s/ J. S. PERRY

Judge

Dated: December 6, 1972.

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

CAROLE ANDERSON ROMASANTA, et al.,
Plaintiffs,
vs.
UNITED AIRLINES, INC.
Defendants.
No. 70 C 1157

ORDER

This matter coming before the Court for the entry of a final order and the Court being fully advised of all relevant circumstances, the Court finds as follows:

A. This lawsuit was filed in 1970 as a class action on behalf of all United Air Lines, Inc. stewardesses who were discharged on account of marriage, alleging that their discharges constituted sex discrimination in violation of Title VII of the Civil Rights Act of 1964 (42 U. S. C. § 2000e *et seq.*). In a memorandum opinion dated December 6, 1972, this Court ordered that the class action allegations of the complaint be stricken and that certain persons be allowed to intervene as Plaintiffs. In addition to the named Plaintiffs, Carole Anderson Romasanta and Brenda Bailes Altman, intervention was granted for Plaintiffs Sandra Moore Ballinger Hoiles, Sarah A. Boling, Carol Elaine Brackle, Catherine Reese Colvin, Susan Fusco, Judith Hopkins Pendleton, Terry Baker Van Horn, Mary O'Connor Whitmore, Marlene Riehl Carney, Rita Gardino Trubshaw King, Lynn Mason Raymond and Joanne Fitzgerald Hamersley. The Court denied the motions to intervene of Elizabeth Glenn Ashworth, Bernadette Dixon, Barbara A. Klocek, Gloria Lala,

Patricia M. Moon, Janice Schmidt Rensch, Jeanette Byers Schlau and Evelyn A. Ambrose, on the ground that these individuals accepted reinstatement in full satisfaction of their grievances. The Court also denied the motions to intervene of Mary Weis, Helen Read Gunst, Diane M. Welty and Doris Rivas Collins on the ground that these individuals had similar actions pending elsewhere. Subsequently, on April 25, 1973, this Court granted the motion to intervene of Carol Paglia Barounes.

B. After this Court's rulings in the companion case entitled *Sprogis* v. *United Air Lines, Inc.*, Case No. 68 C 2311, holding that Defendant United Air Lines, Inc. had violated Title VII of the Civil Rights Act of 1964 when it discharged Plaintiff Sprogis on account of her marriage (308 F. Supp. 959 (N. D. Ill. 1970), aff'd. 444 F. 2d 1194 (7th Cir. 1971), cert. den. 404 U. S. 991 (1971)) and subsequently affirming the recommendation of Special Master David Shipman as to the amount of damages which Plaintiff Sprogis was entitled to recover from Defendant United Air Lines (memorandum opinion of June 10, 1974, aff'd. 517 F. 2d 387 (7th Cir. 1975)), counsel for the parties in this case negotiated settlements of the claims of Plaintiffs Susan Fusco, Mary Whitmore, Rita King, Marlene Carney, Carol Barounes, Judith Pendleton, Terry Van Horn, Brenda Bailes Altman, Carol Elaine Brackle, Sandra Hoiles, Carole Romasanta and Joanne Hamersley. In such negotiations the rulings of this Court in *Sprogis* with respect to back pay were applied. In particular, in their negotiations, counsel in good faith applied this Court's ruling in *Sprogis* with respect to the following:

a. As to any Plaintiff who had not been reinstated to her former position as Stewardess, the parties commenced their negotiations by deciding her right to reinstatement;

b. Each Plaintiff's entitlement to back pay was based upon the monthly base-pay rate for stewardesses in the relevant collective bargaining agreement, plus ten hours of overtime pay per month;

c. Computations of each Plaintiff's maximum entitlement to back pay were made by computing the back pay from the date of each Plaintiff's discharge to the date of her reinstatement, deducting all interim earnings;

d. As to any Plaintiff who was pregnant during the claim period, back pay was deducted for an eight-month period of pregnancy.

e. Appropriate consideration was given by the parties to the question of whether each Plaintiff sought interim employment with reasonable diligence; and

f. Each Plaintiff except Carole Romasanta recovered interest on the agreed back pay award, computed on a quarterly earnings basis at the rate of six per cent per annum.

C. The parties were unable to reach agreement with respect to two of the Plaintiffs and with respect to these two Plaintiffs the Court issued the following orders:

a. On July 3, 1975, this Court ordered the reinstatement of Plaintiff Sarah Ann Boling with 7½ years of seniority and without any back pay or other compensation.

b. On August 5, 1975, this Court granted Defendant United Air Lines' motion to dismiss the complaint as to Plaintiff Lynn Mason Raymond.

D. Plaintiff Catherine Reese Colvin has moved for leave to withdraw as a Plaintiff in this action, and to waive any claim to relief herein.

E. All matters affecting the claims of each of the 15 Plaintiffs relating to reinstatement and back pay have now been resolved. The only issue remaining concerns the propriety of an award of attorneys' fees and costs pursuant to Section 706(k) of the Civil Rights Act of 1964 as amended (42 U. S. C. § 2000e-5(k)).

IT IS THEREFORE ORDERED:

1. That the complaints of Plaintiffs Susan Fusco, Mary Witmore, Rita King, Marlene Carney, Carol Barounes, Judith Pendleton, Terry Van Horn, Brenda Bailes Altman, Carol Elaine Brackle, Sandra Hoiles, Carole Romasanta and Joanne Hamersley are hereby dismissed with prejudice, all matters in controversy with respect to such claims having been settled and resolved.

2. That the complaint of Plaintiff Catherine Reese Colvin is dismissed with prejudice.

3. That the Court expressly reserves jurisdiction for the purpose of considering an application for attorneys' fees and costs, which application Plaintiffs' counsel shall file within twenty days hereof.

ENTER:

/s/ J. S. PERRY
Judge

Dated: October 3, 1975

UNITED STATES DISTRICT COURT,
Northern District of Illinois
Eastern Division

Name of Presiding Judge, Honorable Joseph Sam Perry

Cause No. 70 C 1157 Date October 21, 1975

Title of Cause—Carole Romasanta et al. v. United Air Lines, Inc.

Brief Statement of Motion—Petition of Liane Buix McDonald to Intervene for Purposes of Taking an Appeal is hereby denied.

Names and Addresses of moving counsel—Thomas R. Meites, 33 N. Dearborn, Suite 920, Chicago, Ill. 60602, attorney for petitioner.

Names and Addresses of other counsel entitled to notice and names of parties they represent.—James Gladden, Jr., Mayer, Brown & Platt, 231 S. LaSalle, Chicago, Ill. 60604, attorney for defendant; Richard Watt, Cotton, Watt, Jones, King & Bowlus, One IBM Plaza, Suite 4750, Chicago, Ill. 60611, attorneys for plaintiffs.

Enter Order.

Perry
Oct. 21, 1975

IN THE UNITED STATES COURT OF APPEALS,
for the Seventh Circuit.

No. 75-2063

CAROLE ANDERSON ROMASANTA, ET AL.,
Plaintiffs,

vs.

UNITED AIRLINES, INC., a corporation,
Defendant-Appellee,

LIANE BUIX MCDONALD, on her own behalf and on behalf of others similarly situated,
Petitioning Intervenor-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division No. 70 C 1157.

J. SAM PERRY, *Judge.*

ARGUED FEBRUARY 17, 1976—DECIDED JULY 1, 1976

Before FAIRCHILD, *Chief Judge*, CUMMINGS and PELL, *Circuit Judges.*

PER CURIAM. This case is related to *Sprogis* v. *United Air Lines, Inc.*, 444 F. 2d 1194 (7th Cir. 1971), certiorari denied, 404 U. S. 991, where we held that United's policy of refusing to employ married stewardesses was discrimination based on sex in violation of Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 (42 U. S. C. §§ 2000e-2(a)(1). During

the pendency of the *Sprogis* appeal, Carole Romasanta[1] filed the present suit on behalf of herself and other United stewardesses who were similarly discharged. Appellant Liane McDonald ("petitioner") was a member of the putative class in *Romasanta.*

On December 6, 1972, while defendant was still denying liability, the district court filed a memorandum opinion and order that this case should not proceed as a class action. However, the court permitted twelve former stewardesses to intervene "by way of joinder as additional parties plaintiff" since they had protested defendant's no-marriage rule by filing a grievance under the collective bargaining contract or by complaint to the Equal Employment Opportunity Commission or a comparable state agency. Petitioner and 140 other stewardesses[2] were thus excluded from the case.

On July 3, 1974, the district court granted the plaintiffs' motion for summary judgment and appointed a special master to recommend the compensation for each plaintiff. On October 3, 1975, the court issued a final order incorporating a settlement providing for reinstatement and back-pay awards to the plaintiffs herein. In this order, the court only reserved jurisdiction to consider attorney's fees and costs.

Five days after the October 3, 1975, order terminating the litigation, petitioner first learned that the plaintiffs herein would probably not appeal the adverse class determination, and on October 17th she learned that there would definitely be no appeal. Consequently, on October 21st, she petitioned to intervene in order to file a notice of appeal with respect to the district court's final order of October 3, 1975, insofar as it reiterated striking the class action allegations from the complaint.[3]

1. Brenda Bailes Altman was added as a plaintiff on October 9, 1970.

2. The figure is derived from p. 2 of petitioner's main brief and p. 13 of the EEOC's brief and may be excessive. Defendant asserts there are only 30 in this class (defendant's main brief 50).

3. On December 27, 1972, we refused to grant leave to appeal from the district court's December 6, 1972, interlocutory order

(Continued on next page)

On October 23rd, petitioner filed a notice of appeal from the October 21st order denying her petition to intervene and also filed a notice of appeal from the October 3, 1975, order insofar as the district judge had refused to permit the cause to proceed as a class action. Because the district court erred in denying the motion to intervene and in refusing to certify a class, we reverse and remand.

Whether the petitioner should have been permitted to intervene is governed by Rule 24 of the Federal Rules of Civil Procedure. In pertinent part, Rule 24(b)(2) provides:

> "(b) *Permissive intervention.* Upon timely application anyone shall be permitted to intervene in an action:
>
> * * * * *
>
> "(2) when an applicant's claim or defense and the main action have a question of law or fact in common. * * * In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

Defendant's primary contention is that the motion to intervene was not timely. The Supreme Court has held: "Timeliness is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review." *NAACP* v. *New York*, 413 U. S. 345, 366. Among the relevant factors are the stage of the litigation at which the intervention is sought, the interests of the intervenors, the purposes of the statute under which the suit is brought and the relative harm to the parties. *NAACP* v. *New York, supra*, 413 U. S. at 366-369; *EEOC* v. *United Air Lines, Inc.*, 515 F. 2d 946, 949 (7th Cir. 1975). Defendant argues that the motion to intervene would have been timely only if it

(Continued from preceding page)

striking the class allegations, so that an appeal first became appropriate after the district court's final order of October 3, 1975. The denial of the class allegations was not appealable earlier. *Anschul* v. *Sitmar Cruises, Inc.*, ... F. 2d ..... (7th Cir. No. 74-1908, decided May 17, 1976).

was made immediately after the court refused to certify a class. We disagree.

In our view, petitioner's application was timely within the rule because she was not advised until October 17th that the plaintiffs would not appeal from Judge Perry's final order.[4] Plaintiffs' previous attempt to appeal from Judge Perry's interlocutory order denying class status, although unsuccessful (see note 3, *supra*), indicated that they would be willing to pursue the question after final judgment. Petitioner could reasonably rely on this representation and therefore her delay in filing the motion to intervene was excusable. See *Jimenez* v. *Weinberger*, 523 F. 2d 689, 695-697 (7th Cir. 1975); *Hodgson* v. *United Mine Workers*, 473 F. 2d 118, 130 (D. C. Cir. 1972).

Our holding is consistent with the purposes of Title VII. Because the Civil Rights Act of 1964 attacks class-based discrimination, it is particularly appropriate that suits to remedy violations of the Act be brought as class actions. See *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 717, 619-720 (7th Cir. 1969). The relief sought in these suits to establish equality, not only between the group discriminated against and other groups but also among the members of the victimized group. *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 417-421; *Bowe* v. *Colgate-Palmolive Co., supra*, 416 F. 2d at 719-720; *Oatis* v. *Crown Zellerbach Corp.*, 398 F. 2d 496, 498 (5th Cir. 1968). The primary burden of enforcing Title VII rests with private plaintiffs. *Air Line Stewards & Stewardesses Ass'n.* v. *American Air Lines*, 455 F. 2d 101, 108 (7th Cir. 1972); *Jenkins* v. *United Gas Corp.*, 400 F. 2d 28, 32 (5th Cir. 1968).[5] Because of the statutory reliance on private enforce-

4. *EEOC* v. *United Air Lines, Inc., supra*, is not to the contrary, for there representation of the intervenor's interest by existing parties was adequate when intervention was sought. Intervention was sought here as soon as it was apparent that plaintiffs would not appeal the final order denying class status.

5. Because the Voting Rights Act in force at the time of the suit did not authorize a private action, *NAACP* v. *New York, supra,*

(Continued on next page)

ment, the courts have suspended the requirement that each victim of discrimination file a complaint with the EEOC once one member of the class has filed the protest. *Dodge* v. *Giant Food, Inc.*, 448 F. 2d 1333 (D. C. Cir. 1973); *Bowe* v. *Colgate-Palmolive Co., supra,* 416 F. 2d at 720; *Oatis* v. *Crown Zellerbach Corp., supra.*[6] That logic also compels the conclusion here that in court, as well as before the agency, the members may rely on the champion of the class until he or she abdicates. In this case we believe that abdication occurred when plaintiffs decided not to appeal the adverse class action determination. To hold otherwise would permit one member of the class to obtain benefits greater than other members.[7] This disparity would result, not from petitioner's lack of assertiveness, but from the district court's erroneous ruling on the class action question. This result would be inconsistent with Title VII's goal to establish equality among members of the aggrieved class.

Finally, intervention would not prejudice the adjudication of the rights of the original parties, for defendant knew of the potential liability to this class since the commencement of the

(Continued from preceding page)

relied upon by defendants is distinguishable. Further, in *NAACP* there was no support for the claim that the representation of the intervenor's interests by the United States was inadequate. 413 U. S. at 368.

6. See also *American Pipe & Construction Co.* v. *Utah,* 414 U. S. 538, 551. The specific holding in *American Pipe* that the statute of limitations is tolled only during the pendency of the motion to certify a class and begins to run anew if the motion is denied is not applicable here. The statute of limitations in Title VII actions is suspended once one member of the class initiates the grievance mechanism. See *Bowe* v. *Colgate-Palmolive Co., supra,* 416 F. 2d at 720.

7. The plaintiffs and the petitioner must be considered to be members of the same class. Any distinction between them such as the filing of an EEOC or state agency complaint or a grievance with the union is not signfiicant. Once a timely administrative complaint has been filed by one stewardess, all others who were discharged by operation of the rule are entitled to recover. Similiarly, the filing of a union grievance cannot be made a precondition of recovery. *Albemarle Paper Co.* v. *Moody, supra,* 422 U. S. at 414, n. 8.

class action, and until October 17th defendant could reasonably expect this liability to be enforced through an appeal of the adverse class ruling. *Jimenez* v. *Weinberger, supra,* 523 F. 2d at 701.

The other requirements of Rule 24(b)(2) have also been met. Petitioner's claim and the main action had questions of law in common, namely, the correctness of the striking of the class allegations and the remedy for the illegal no-marriage rule as applied to petitioner's class. The petition to intervene was not governed by the ten-day provision of Rule 59(e) of the Federal Rules of Procedure, for petitioner's motion did not ask the district court "to alter or amend the judgment" but was for purposes of taking an appeal from the final judgment. It is entirely proper then to permit putative class members here to intervene for the purpose of pursuing an appeal of the adverse class action determination. *Black* v. *Central Motor Lines, Inc.*, 500 F. 2d 407, 408 (4th Cir. 1974); *Smuck* v. *Hobson,* 408 F. 2d 175, 177-182 (D. C. Cir. 1969) (en banc).

Because petitioner was entitled to be an intervenor and filed a timely notice of appeal from the final order terminating the litigation, we have power to examine the adverse class ruling and accordingly deny defendant's motion to strike that notice of appeal and to dismiss that appeal.

In this case, the district court judge refused to certify the class because the putative members had failed to show an interest in reemployment either by filing a grievance with the union or a complaint with the EEOC. It is well established, however, that the filing of a charge with the EEOC is not a prerequisite to recovery as a member of an injured class where one member of the class has done so. *Bowe* v. *Colgate-Palmolive Co., supra,* 416 F. 2d at 720. Nor do we believe that each member of the class can be required to exhaust other remedies before recovering. See *Albemarle Paper Co.* v. *Moody, supra,* 422 U. S. at 414, n. 8. The district court's order denying class action status must therefore be reversed.

In *Bowe* v. *Colgate-Palmolive Co., supra,* we stressed the appropriateness of a class action in a Title VII case. See also *Air Line Stewards & Stewardesses Ass'n* v. *American Airlines, Inc.*, 490 F. 2d 636, 643 (7th Cir. 1973), certiorari denied, 416 U. S. 993. On remand, the district court must comply with our ruling in *Bowe* that "relief should be made available to all who were so damaged, whether or not they filed [EEOC or comparable state agency] charges and whether or not they joined in the suit." 416 F. 2d at 721. As stated in *Oatis* v. *Crown Zellerbach Corporation,* 398 F. 2d 496, 498 (5th Cir. 1968), "It would be wasteful, if not vain, for numerous employees, all with the same grievance, to have to process many identical complaints with the EEOC." As petitioner has explained in her affidavit supporting her petition to intervene, she knew that other former United Air Lines' stewardesses were challenging the no-marriage policy and therefore did not file a discrimination charge against United or a grievance under the collective bargaining agreement. We conclude that the women in petitioner's class are entitled to participate in this case under *Bowe* unless they choose to opt out under Rule 23(c)(2) of the Federal Rules of Civil Procedure.[8]

The district court's orders of October 3 and 21, 1973, are reversed with instructions to permit petitioner to intervene on her own behalf and on behalf of her class, to treat the case as an action by her class, and to fashion relief for her class.

PELL, *Circuit Judge,* dissenting. The Romasanta suit out of which the present issue arose required five years for a resolution to be reached. When that suit reached a critical point insofar as petitioner's interests were concerned more than three years ago, it in my opinion was incumbent upon her then to take immediate affirmative steps to protect her interests if she wanted to take advantage of this lawsuit as a forum for her claims.

8. This opinion does not preclude the defendant from mitigating liability or rebutting the damage claim of some members of petitioner's class. *Sprogis* v. *United Air Lines, Inc.*, 517 F. 2d 387, 392 (7th Cir. 1975).

In my opinion Judge Perry clearly acted properly when he denied the motion to intervene as untimely:

> THE COURT: Well, in my judgment, gentlemen, this is five years now this has been in litigation, and this lady has not seen fit to come in here and seek relief from this Court in any way during that period of time, and litigation must end. I must deny this motion. Of course, this is an appealable order itself, and if I am in error then the Court of Appeals can reverse me and we will grant a hearing, but in my judgment this is too late to come in.

Since I agree with Judge Perry and disagree with the majority finding that Judge Perry abused his discretion, I respectfully dissent.

Questions of timeliness are peculiarly appropriate for determination by the trial court, and it is for that reason that the appropriate standard for review is to determine whether there has been an abuse of discretion. The United States Supreme Court, in *NAACP* v. *New York,* 413 U. S. 345 (1973), in affirming the lower court's denial of a motion to intervene on the basis of timeliness, set forth the standard by which this Court must review Judge Perry's ruling as follows (413 U. S. at 365-66):

> Intervention in a federal court suit is governed by Fed. Rule Civ. Proc. 24. Whether intervention be claimed of right or as permissive, it is at once apparent, from the initial words of both Rule 24(a) and Rule 24(b) that the application must be "timely." If it is untimely, intervention must be denied. Thus the court where the action is pending must first be satisfied as to timeliness. Although the point to which the suit has progressed is one factor in the determination of timeliness, it is not solely dispositive. Timeliness is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion: unless that discretion is abused, the court's ruling will not be disturbed on review. (Footnotes omitted.)

This same standard has consistently been applied in cases involving Title VII of the Civil Rights Act. *E.g., EEOC* v.

United Air Lines, Inc., 515 F. 2d 946 (7th Cir. 1975); *Black* v. *Central Motor Lines, Inc.*, 500 F. 2d 407 (4th Cir. 1974).

In *NAACP*, the Supreme Court upheld the district court's determination that the motion to intervene was untimely, even though it was filed only seventeen days after the would-be intervenors allegedly became aware of the suit, stating that "it was incumbent upon the appellants, at that stage of the proceedings, [a critical stage] to take immediate affirmative steps to protect their interests. . . ." 413 U. S. at 367.

In *EEOC, supra*, this court denied a motion to intervene as untimely in a situation much less extreme than the instant case. A pattern and practice suit was brought in April 1973, under Title VII of the Civil Rights Act, alleging discrimination against black and female employees of United Air Lines. The complaint was amended in February 1974 to include allegations of discrimination against Spanish-surnamed and Asian-American employees. When two organizations representing these latter groups attempted to intervene in July 1975, this Court affirmed the denial of intervention as untimely, even though the trial had not yet begun, because the intervenors had offered no excuse for waiting *5 months* after the complaint was amended and their interest in the action first created. See also *SEC* v. *Bloomberg*, 299 F. 2d 315 (1st Cir. 1962); *Hoots* v. *Pennsylvania*, 495 F. 2d 1095, 1097 (3d Cir. 1974), *cert. denied*, 419 U. S. 884; and *Westward Coach Manufacturing Company, Inc.* v. *Ford Motor Co.*, 388 F. 2d 627, 635 (7th Cir. 1968), *cert. denied*, 392 U. S. 927.

In a class action situation, the determination of when intervention is first appropriate relates to the question of adequacy of representation. In a true class action, it is unnecessary for an unnamed class member to intervene as long as his interests are being protected by his class representatives. In *Alleghany Corporation* v. *Kirby*, 344 F. 2d 571 (2d Cir. 1965); *cert. granted*, 381 U. S. 933, *cert. dismissed as improvidently granted*, 384 U. S. 28 (1966), where the Second Circuit denied a "last-

minute" attempt at intervention by shareholders in a derivative suit to set aside a settlement on behalf of their corporation, the court explained the connection between timeliness and adequate representation (344 F. 2d at 574):

> As we see it, the timeliness requirement, specifically articulated in Rule 24(a), is related to the question whether the shareholders' interests are or may be inadequately represented, for whether an application to intervene is prompt or tardy also turns on when the interests of the proposed intervenors were no longer properly represented.

When petitioner's application for intervention is viewed in the light of these cases, it appears clear to me that the motion was untimely. Petitioner admits knowledge of the class action denial in Romasanta in 1972 and yet offers no persuasive reason for her failure to petition to intervene then. Once the class was denied, and the suit proceeded as an individual action, she had no reason to believe her interests were being represented or protected by others. This was particularly true since the class action denial had the effect of excluding from the case all those who, like petitioner, had not protested the no-marriage rule. There was no longer anyone similarly situated to petitioner in the case.

Petitioner admits knowledge of the course of the *Sprogis* (or related) litigation from the very start (*i.e.*, September 1968, the time of her alleged discharge). Yet she made no attempt to intervene in *Sprogis* to appeal from the denial of class action in 1972 or from the final order in 1974.[1]

But instead, petitioner, with claimed knowledge of the pending lawsuits concerning the no-marriage rule, did nothing and waited seven years to identify herself as one who sought relief. Petitioner now wants to start this case all over again—three

1. Petitioner argues that she relied upon the parties in Romasanta to appeal the class action decision. But ALPA, the party responsible for bringing both the *Sprogis* and Romasanta actions, did not appeal the class denial in *Sprogis* (nor did anyone else), so there appears to be no reason for petitioner's reliance on the same parties' appealing the class decision in Romasanta.

years after Romasanta was declared not to be a class action, after many others were permitted to intervene, and after extensive negotiations in which the parties were finally able to resolve the issues in this case.

Consistent with petitioner's unhurried conduct is the fact that her motion to intervene violates the only procedural rule under which her motion can be brought, *i.e.*, Fed. R. Civ. P. 59(e). Rule 59(e) provides that "[a] motion to alter or amend the judgment shall be served not later than 10 days afer entry of the judgment." Petitioner's motion to intervene was clearly a motion to alter or amend the judgment to add an additional party. It was served on October 17 and heard on October 21, 1975, all well beyond ten days after the entry of the final order on October 3.

It is important to note that had she sought intervention immediately after the denial of class status, and her intervention had been denied, the intervention issue would have been before this court three years ago. Furthermore, assuming that her intervention had been denied because of petitioner's failure to protest the no-marriage rule—the requirement which was the basis of the court's holding that this action lacked the requisite numerosity to proceed as a class action—then *that* issue would have been before this court and decided three years ago. Instead, petitioner chose to sit back and allow others to assume the costs and risks in prosecuting their individual actions, and now she attempts to revive her dead claim through another suit which after years of legal argument and negotiation was finally settled to the satisfaction of all parties.

When a class action is denied, former putative class members may not ignore this fact and continue on the assumption the suit is a class action ("spurious" or otherwise), as does petitioner. The denial of class status is a critical point which puts putative class members on notice that they must act to protect their rights. The tolling procedure established by the Supreme Court in *American Pipe & Construction Co.* v. *Utah*, 414 U. S. 538 (1974), would have no meaning without its corollary requirement that as soon as the class is decertified, former class members who want relief must "make timely motions to intervene" (414 U. S. at 553).

Finally, it should be noted that the timeliness requirements of Rule 24 have been interpreted more strictly by the courts after judgment, where absent very unusual circumstances intervention is not permitted. *United States* v. *Blue Chip Stamp Co.*, 272 F. Supp. 432, 436 (C. D. Calif. 1967), *affirmed per curiam sub nom. Thrifty Shoppers Scrip Co.* v. *United States*, 389 U. S. 580 (1968):

> The requirement of timeliness is not without foundation. The interest in expeditious administration of justice does not permit litigation interminably protracted through continuous reopening. A motion to intervene after entry of the decree should therefore be denied in other than the most unusual circumstances.

Accord, Chase Manhattan Bank v. *Corporation Hotelera de Puerto Rico*, 516 F. 2d 1047, 1050 (1st Cir. 1975) (per curiam); *Pennsylvania* v. *Rizzo*, 66 F. R. D. 598, 600 (E. D. Pa. 1975); 3B *Moore's Federal Practice* § 24.13[1] (1975 ed.); 7A Wright & Miller, *Federal Practice and Procedure*, § 1916 at 579-80 (1972).

Since, in my opinion, the timeliness issue is dispositive of this case, I have not deemed it necessary to advert to the other issues raised on this appeal.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 1, 1976.

Before
HON. THOMAS E. FAIRCHILD, *Chief Judge*
HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. WILBUR F. PELL, JR., *Circuit Judge*

No. 75-2063

CAROLE ANDERSON ROMASANTA, et al.,
Plaintiffs,
vs.
UNITED AIRLINES, INC., a corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 70 C 1157
J. Sam Perry, Judge.

ORDER

On consideration of the petition of the Appellee United Airlines, Inc. for a rehearing by the Court, and, a majority of the judges in regular active service not having voted for a rehearing en banc and a majority of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition of the Appellee for a rehearing be denied.

Judges Pell, Tone, Bauer and Wood voted to grant a rehearing en banc.

APPENDIX B.

PARTIES

Rule 23.

CLASS ACTIONS

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whethe: or not favorable

to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

As amended Feb. 28, 1966, eff. July 1, 1966.

Rule 24.

INTERVENTION.

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

As amended Dec. 27, 1946, eff. March 19, 1948; Feb. 28, 1966, eff. July 1, 1966.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

As amended Dec. 27, 1946, eff. March 19, 1948.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which

intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U. S. C. § 2403.

As amended Dec. 29, 1948, eff. Oct. 20, 1949; Jan. 21, 1963, eff. July 1, 1963.